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MBSB BANK BHD v. ERAKEMAS SDN BHD

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[WINDING UP PETITION NO: PA-28NCC-86-07-2023]
15 JULY 2024

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Abstract – *A company is deemed unable to pay its debts and can be wound up when it fails to comply with the statutory demand made pursuant to s. 466 of the Companies Act 2016. A company's inability to pay its debts is determined by its current financial health, not by potential future assets. The expectation of future income, in this case contract payments, cannot shield a company from a winding-up petition.*

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COMPANY LAW: *Petition – Winding up – Application for – Borrower defaulted in banking facilities granted by bank and consent order recorded – Bank issued borrower with statutory notice under s. 466 of Companies Act 2016 – Borrower failed to comply with statutory notice – Bank presented winding up petition against borrower – Whether borrower demonstrated that it was able to pay debts – Whether borrower had sufficient current assets to meet current liabilities – Whether borrower commercially insolvent and could be wound up – Whether borrower able to pay debts 'as and when they fall due' – Whether borrower deemed unable to pay debt – Whether ought to be wound up*

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CIVIL PROCEDURE: *Stay – Stay of winding up petition – Application for – Borrower defaulted in banking facilities granted by bank and consent order recorded – Bank issued borrower with statutory notice under s. 466 of Companies Act 2016 – Borrower failed to comply with statutory notice – Bank presented winding up petition against borrower – Expectation by borrower of future income, ie, contract payments – Whether expectation special circumstance that justified stay of petition*

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The respondent was awarded with a contract by the Ministry of Education ('MOE') to build a school. The petitioner had granted banking facilities to the respondent to carry out the construction contract. The respondent, however, defaulted and this prompted the petitioner to file a civil suit against the respondent. The petitioner and the respondent later recorded a consent order for the latter to pay the former approximately RM2.812 million and other amounts ('judgment debt'). The respondent eventually defaulted under the consent order. The petitioner issued and served the respondent with the statutory notice under s. 466 of the Companies Act 2016 ('s. 466 notice'); the respondent failed to comply with the s. 466 notice. The petitioner then presented a winding up petition against the respondent. The respondent applied to stay the petition on the grounds that: (i) the purpose that it took the banking facility from the petitioner was to finance the performance of the construction contract with the MOE. The respondent was required to open a revenue collection account ('RCA'), operated by the petitioner, in order to

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receive the contract payments from the MOE; (ii) the respondent defaulted in paying the judgment debt and, hence, failed to pay the amount demanded under the s. 466 notice because the MOE did not pay the contract proceeds into the RCA. In other words, the petition would have been redundant if the MOE had made payments into the respondent's account; (iii) the MOE owed the respondent a combined amount of RM4.512 million, which was more than enough to satisfy the petitioner's demand for approximately RM2.865 million. Once the MOE makes these payments, according to the respondent, it would be able to pay the judgment debt to the petitioner; and (iv) through its letters to the respondent, the MOE promised to pay the respondent. Resisting the petitioner's petition, the respondent further submitted that: (i) the amount demanded by the petitioner under the s. 466 notice was not verified as the petitioner had not produced a statement of account that showed that the amount demanded was the correct amount of the judgment debt due at the time; (ii) the respondent had made two part-payments, totalling to RM50,000, to the petitioner and it was not known whether the petitioner had accounted for those payments; and (iii) it was a solvent company and should not be wound up. When the MOE money comes in, it would be able to pay off the judgment debt.

Held (dismissing application to stay winding up petition; allowing winding up petition):

(1) The asserted promise-to-pay from the MOE was made in August 2023. At the hearing of the respondent's stay application, nine months had lapsed but no payment was made. The respondent had not produced any evidence that the MOE had paid the respondent or paid money into the RCA. This unsubstantiated and unrealised ground could hardly be considered an appropriate reason to stay this petition. When the respondent failed to satisfy the statutory demand under the s. 466 notice within the prescribed time, the respondent was deemed to be unable to pay its debt to the petitioner. The question that must be considered was whether the respondent could have paid the judgment debt to the petitioner and not whether the respondent would receive, or would likely receive, payments from the MOE so that its judgment debt could later be paid. There was no special circumstance that justified a stay of the petition. There was also no reason to adjourn the hearing of the petition, conditionally or unconditionally. (paras 19-21)

(2) Firstly, it was for the respondent to demonstrate that it was able to pay its debts. If it did not have sufficient current assets available to meet its current liabilities, then it was commercially insolvent and could be wound up. The second factor to consider in the petition was the respondent's inability to pay its debts 'as and when they fall due'. This inability to pay its debts was evinced by the respondent's failure to settle the statutory demand, made by the petitioner, under the s. 466 notice. Thirdly, when there was no doubt that the respondent was deemed

unable to pay its debt to the petitioner and was, therefore, commercially insolvent, it would be unjust to dismiss the petition just because the respondent raised a question about the precise amount owing as it had made part-payments. Here, the amount demanded was for approximately RM2.865 million. The respondent's total part-payment was only RM50,000, a very small portion of the demanded debt. The respondent was obviously currently unable to pay its judgment debt to the petitioner. In the premises, the petitioner had demonstrated that the respondent was deemed unable to pay the judgment debt. The respondent should be wound up. (paras 25, 27, 29 & 31)

Case(s) referred to:

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Pioneer Concrete (Malaysia) Sdn Bhd v. Celini Corporation Sdn Bhd [1999] 5 CLJ 145 HC ***(refd)***

Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 465(1)(e), (h), 466(1)(a), 469(1)(b), (c)

For the petitioner - Lim Pey Tsyr & Eunice Aw Shze Xian; M/s Kee Sern, Siu & Huey
For the respondent - Mashitah Jamaluddin; M/s Rosli Ismail & Co

Reported by Najib Tamby

JUDGMENT

(Stay Of Winding Up Petition)

Kenneth St James JC:

Prelusion

[1] The respondent (R) applies for a stay of this winding up proceeding pending the Ministry Of Education's (MOE's) payment of Interim Certificate No. 58 and Interim Certificate No. 59 to R.

[2] Should a stay of proceedings be granted?

The Pertinent Facts And Chronology Of Proceedings

[3] The MOE awarded a contract to R to build a school. The petitioner (P) granted banking facilities to R to carry out the construction contract. R defaulted. P filed a civil suit against R.

[4] On 12 April 2023, P and R recorded a consent order for R to pay P approximately RM2.812 million and other amounts (judgment debt). The judgment debt was to be paid from the contract payments the MOE pays R for the construction contract. But if R does not receive the contract payments from the MOE, the judgment debt must still be paid by R. R defaulted under the consent order.

[5] In June 2023, P issued and served the s. 466 of the Companies Act 2016 statutory notice on R. R failed to comply.

[6] In July 2023, P presented this winding up petition against R.

[7] In September 2023, R filed an application to stay this petition. I fixed R's stay application and the petition to be heard one-after-the-other on the same date – 31 May 2024.

The Law On Winding Up Petitions And Stay Of Winding Up Proceedings

[8] P petitions to wind up R under the following provisions of the Companies Act 2016 (CA 2016).

[9] Section 465(1)(e) of the CA 2016 provides that a company can be wound up if it is "unable to pay its debts". Section 465(1)(h) provides that a company can also be wound up if it is just and equitable to wind it up.

[10] Section 466(1)(a) is the deeming section that provides that a company is deemed to be "unable to pay its debts" if a creditor issues and serves on the company the prescribed statutory notice to demand the amount due and payable, and the company does not pay the amount after 21 days.

[11] R applies for a stay of the winding up proceedings under the following provisions of the CA 2016.

[12] Section 469(1)(b) provides that on the hearing of the petition, the court can "adjourn the hearing conditionally or unconditionally".

[13] Section 469(1)(c) provides that on the hearing of the petition, the court can "make any interim or any other order that the court thinks fit".

R's Stay Application

R's Ground For A Stay

[14] The purpose that R took the banking facility from P was to finance the performance of the construction contract with the MOE. R was required to open a revenue collection account (operated not by R, but by P). This revenue collection account was to receive the contract payments from the MOE.

[15] R submits that it defaulted in paying the judgment debt and hence, failed to pay the amount demanded under the s. 466 statutory notice solely because the MOE did not pay the contract proceeds into the revenue collection account. In other words, this petition would have been redundant if the MOE had made payments into R's account.

[16] R further submits that the MOE owes R the amount under Interim Certificate No. 58 for approximately RM2.185 million, and the amount under Interim Certificate No. 59 for approximately RM2.327 million. This combined amount of RM4.512 million is more than enough to satisfy the statutory notice demand for approximately RM2.865 million.

[17] R argues that once the MOE makes these payments, R will be able to pay the judgment debt to P.

[18] R produces a letter dated 7 August 2023 from the MOE, promising that the money will be paid over once the Ministry Of Economy and the Ministry Of Finance give their approval. R also produced another letter, which was dated 20 September 2023 from the MOE, making the same promise.

My Findings

[19] First – the asserted promise-to-pay from MOE was made in August 2023. At the hearing of R's stay application (on 31 May 2024), nine months had lapsed. No payment was made. R has not produced any evidence that MOE has paid R or paid money into the revenue collection account. This unsubstantiated and unrealised ground can hardly be considered an appropriate reason to stay this winding up petition. Nor can it be considered a special circumstance that warrants a stay.

[20] Second – when R failed to satisfy P's s. 466 statutory demand within the prescribed time, R was deemed to be unable to pay its debt to P. The question that I must consider is whether R could have paid the judgment debt to P, and not whether R will receive, or will likely receive, payments from the MOE so that its judgment debt could later be paid.

[21] I am therefore compelled to find that there is no special circumstance that justifies a stay of this winding up petition. I see no reason to adjourn the hearing of this petition, conditionally or unconditionally. I also see no fit reason to make an interim or final order to stay this petition.

P's Winding Up Petition

R's Opposing Arguments

[22] One – R argues that the s. 466 statutory demand amount is not verified. R argues that P has not produced a statement of account that shows that the amount demanded by P in the statutory notice is the correct amount of the judgment debt due at the time. R submits that it had made two RM25K part payments (total: RM50K) to P, and it is not known whether P has accounted for those payments.

[23] In reply, P avers that the RM50K part-payment was accounted for before P issued the s. 466 statutory demand.

[24] Two – R submits that it is a solvent company. R submits that when the MOE money comes in, it will be able to pay off the judgment debt. It should not be wound up.

My Findings

[25] First – it is for R to demonstrate that it is able to pay its debts. If it does not have sufficient current assets available to meet its current liabilities, then it is commercially insolvent and can be wound up. P has the right to petition to wind up R so that the liquidation process can distribute R's assets to settle its debts to the creditors – *Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303; [1992] 1 MLJ 313; [1992] 1 MLRA 311.

[26] In *Sri Hartamas* (*supra*), the Supreme Court held (at p. 308 (CLJ); p. 320 (MLJ)):

> … In this case, **the presumption of insolvency arises when the requirements of** s. 218(2)(a) of the Act [note: equipollent to **section 466(1)(a) of the CA 2016] have been satisfied and it is for the company to prove that it is able to pay its debts.** In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plantcase* and cite the following observations from *Buckley on the Companies Act* (13th Ed) at p 460:
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> > In such a case **it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test.** A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet **if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.**
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> Applying the test in the above-quoted observations, we therefore held that the learned judge had exercised his discretion correctly in ordering the appellant to be wound up. (emphasis added)

[27] Second – the factor to consider in this winding up petition is R's inability to pay its debts "as and when they fall due". This inability to pay its debts is evidenced by R's failure to settle the s. 466 statutory demand made on it by P – *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248; [2001] 4 MLJ 187; [2001] 3 AMR 2893; [2001] 1 MLRA 270.

[28] In *Maril-Rionebel* (*supra*), the Court of Appeal propounded (at p. 260 (CLJ); p. 198 (MLJ)):

> But a petition for winding up is not execution, for **a winding up petition** is not based upon any judgment of a court. Normally, it **is based on the inability of a company to pay its debts as and when they fall due.** Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act (note: equipollent to section 466 of the CA 2016] … (emphasis added)

[29] Third – when there is no doubt that R is deemed unable to pay its debt to P and is therefore commercially insolvent, it would be unjust to dismiss this winding up petition just because R raises a question about the precise amount owing, because it has made part-payments. Here, the s. 466 statutory demand amount is approximately RM2.865 million. R's total part-payment is only RM50k, a very small portion of the demanded debt. R is obviously currently unable to pay its judgment debt to P – *Pioneer Concrete (Malaysia) Sdn Bhd v. Celini Corporation Sdn Bhd* [1999] 5 CLJ 145; [1998] 3 MLJ 810; [1998] 3 MLRH 744; [1998] AMEJ 0337.

[30] In *Pioneer Concrete* (*supra*), the High Court is instructive when it held (at p. 148 (CLJ); p. 814 (MLJ)):

> … A passage from the judgment of Plowman J. In *Re Tweeds Garages Ltd* [1962] 1 Ch D 406 merits reproduction. That passage would nip in the bud the problem … and that passage reads as follows (see pp 413-414 of Plowman J's decision):
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> > From those sections it appears that the only qualification which is required of the petitioners in this case is that they are creditors and about that, as I have said, there is really no dispute. Moreover, it seems to me that *it would*, in many cases, *be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing.* If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine bona fide dispute whether the sum paid off is £10 or £20. The creditor then presents a petition to have the company wound up. *Is the company to be entitled to say: 'It is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?' I think not.* In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, *a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition.*
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> In my judgment, the debt incurred by the respondent to the tune of RM462,819.50 was not in dispute at all. Inability to pay debts under s. 218(1)(e) of the Companies Act 1965 is a common ground for a winding-up order. It is a correct statement of the law to say and I so say that *prima facie, the petitioner as a creditor who is not paid has a right to file a petition for winding-up,* whatever the motives may be. The court is not concerned about the motives of the petitioner here in winding-up the respondent (*Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95). *It is germane to mention that the test of commercial insolvency is simple. It is this. Whether the company is unable to meet its current debts as they fall due*? A company may have substantial wealth which cannot be realized immediately and if that happens the company is said to be unable to pay its debts within the purview and ambit of s. 218(1)(e) of the Companies Act 1965 and this is so even though on liquidation the company will be able to meet all its liabilities … (emphasis added)

[31] In the premises, I find that P has demonstrated that R is deemed unable to pay the judgment debt, and as the cause papers are in order, R should be wound up. In this regard, there is no need for me to determine whether it is just and equitable to wind up R under s. 465(1)(h) of the CA 2016.

Conclusion

[32] For the above reasons, concerning R's application to stay this winding up petition pending the MOE's payment of the amounts under the two interim certificates, I dismiss it with costs of RM7k to be paid by R to P by 1 July 2024. Costs are subject to the allocatur.

[33] Concerning the winding up petition, I allow it with costs of RM12k to be paid out of R's assets. Costs are also subject to the allocatur.